

Service and the National Marine Fisheries Service and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of fish and wildlife resources by considering ways to prevent their direct and indirect loss and damage due to the proposed operation and maintenance activity. The district engineer will give full consideration to these views on fish and wildlife conservation in evaluating the activity. The proposed operations may be modified in order to lessen the damage to such resources. The district engineer should include such justifiable means and measures for fish and wildlife resources that are found to be appropriate. Corps funding of Fish and Wildlife Service activities under the Transfer of Funds Agreement between the Fish and Wildlife Service and the Corps is not applicable for Corps operation and maintenance projects.

(ii) District engineers should consider ways of reducing unavoidable adverse environmental impacts of dredging and disposal activities. The determination as to the extent of implementation of such measures will be done by the district engineer after weighing the benefits and detriments of the maintenance work and considering applicable environmental laws, regulations, and other relevant factors.

(9) *Marine sanctuaries.* Operations and maintenance activities involving the discharge of dredged or fill material in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the ODA should be evaluated for the impact on the marine sanctuary. In such a case, certification should be obtained from the Secretary of Commerce that the proposed project is consistent with the purposes of Title III of the ODA and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(10) *Other state requirements.* District engineers will make all reasonable efforts to comply with state water quality standards and Federally approved coastal zone programs using the procedures of §§ 336.1(b) (8), (9), and 337.2. District engineers should not seek state permits or licenses unless authorized

to do so by a clear, explicit, and unambiguous Congressional waiver of Federal sovereign immunity, giving the state authority to impose that requirement on Federal activities (e.g., CWA sections 401 and 404(t), and CZMA section 307 (c)(1) and (c)(2)).

(11) *Additional factors.* In addition to the factors described in paragraphs (c)(1) through (9) of this section, the following factors should also be considered.

(i) The evaluation of Corps operations and maintenance activities involving the discharge of dredged or fill material into waters of the U.S. is a continuing process and should proceed concurrently with the processing of state water quality certification and, if required, the provision of a coastal zone consistency determination to the state. If a local agency having jurisdiction over or concern with the particular activity comments on the project through the public notice coordination, due consideration should be given to those official views as a reflection of local factors.

(ii) Where officially adopted state, regional, or local land use classifications, determinations, or policies are applicable, they normally will be presumed to reflect local views and will be considered in addition to other national factors.

#### **§ 336.2 Transportation of dredged material for the purpose of disposal into ocean waters.**

(a) *Applicable law.* Section 103(a) of the ODA provides that the Corps of Engineers may issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for disposal into ocean waters.

(b) *Procedures.* The following procedures will be followed by district engineers for dredged material disposal into ocean waters except where emergency action as described in § 337.7 of this chapter is required.

(1) In accordance with the provisions of section 103 of the ODA, the district engineer should issue a public notice giving opportunity for public hearing, following the procedures described in § 337.1 of this chapter for Corps operation and maintenance activities involving disposal of dredged material in

ocean waters, as well as dredged material transported through the territorial sea for ocean disposal.

(2) The public hearing procedures of 33 CFR part 327 should be followed.

(c) *State permits and licenses.* The terms and legislative history of the ODA leave some doubt regarding whether a state has legal authority to exert control over ocean dumping activities of the Corps in the territorial sea covered under the Act (see section 106(d)). Notwithstanding this legal question, the Corps will voluntarily as a matter of comity apply for state section 401 water quality certification and determine consistency with a Federally-approved coastal zone management plan for Corps ocean disposal of dredged material within the three-mile extent of the territorial sea. Moreover, the Corps will attempt to comply with any reasonable requirement imposed by a state in the course of the 401 certification process or the CZMA consistency determination process. Nevertheless, the Corps reserves its legal rights regarding any case where a state unreasonably denies or conditions a 401 water quality certification for proposed Corps ocean disposal of dredged material within the limits of the territorial sea, or asserts that such disposal would not be consistent with an approved state CZMA plan. If such a circumstance arises, the district engineer shall so notify the division engineer who then decides on consultation with CECW-D, CECW-Z, and CECC-E for purposes of determining the Corps of Engineers' appropriate response and course of action.

(d) *Evaluation factors.* (1) In addition to the appropriate evaluation factors of § 336.1(c), activities involving the transportation of dredged material for the purpose of disposal in ocean waters will be evaluated by the Corps to determine whether the proposed disposal will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, the district engineer, in addition to considering the criteria developed by EPA on the effects of the dumping, will also consider navigation, economic and industrial development, and foreign and domestic

commerce, as well as the availability of alternatives to ocean disposal, in determining the need for ocean disposal of dredged material. Where ocean disposal is determined to be appropriate, the district engineer will, to the extent feasible, specify disposal sites which have been designated by the Administrator pursuant to section 102(c) of the ODA.

(2) As provided by the EPA regulations at 40 CFR 225.2(b–e) for implementing the procedures of section 102 of the ODA, the regional administrator of EPA may make an independent evaluation of dredged material disposal activities regulated under section 103 of the ODA related to the effects of dumping. The EPA regulations provide that the regional administrator make said evaluation within 15 days after receipt of all requested information. The regional administrator may request from the district engineer an additional 15-day period for a total of to 30 days. The EPA regulations provide that the regional administrator notify the district engineer of non-compliance with the environmental impact criteria or with any restriction relating to critical areas on the use of an EPA recommended disposal site designated pursuant to section 102(c) of the ODA. In cases where the regional administrator has notified the district engineer in writing that the proposed disposal will not comply with the criteria related to the effects of dumping or related to critical area restriction, no dredged material disposal may occur unless and until the provisions of 40 CFR 225.3 are followed and the Administrator grants a waiver of the criteria pursuant to section 103(d) of the ODA.

(3) If the regional administrator advises the district engineer that the proposed disposal will comply with the criteria, the district engineer will complete the administrative record and sign the SOF.

(4) In situations where an EPA-designated site is not feasible for use or where no site has been designated by the EPA, the district engineer, in accordance with the ODA and in consultation with EPA, may select a site pursuant to section 103. Appropriate NEPA documentation should be used to

support site selections. District engineers should address site selection factors in the NEPA document. District engineers will consider the criteria of 40 CFR parts 227 and 228 when selecting ocean disposal sites, as well as other technical and economic considerations. Emphasis will be placed on evaluation to determine the need for ocean disposal and other available alternatives. Each alternative should be fully considered on an equal basis, including the no dredging option.

(5) If the regional administrator advises the district engineer that a proposed ocean disposal site or activity will not comply with the criteria, the district engineer should proceed as follows.

(i) The district engineer should determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer will evaluate the engineering and economic feasibility and environmental acceptability of the alternative sites.

(ii) If the district engineer makes a determination that there is no economically feasible alternative method or site available, he will so advise the regional administrator of his intent to proceed with the proposed action setting forth his reasons for such determination.

(iii) If the regional administrator advises, within 15 days of the notice of the intent to issue, that he will commence procedures specified by section 103(c) of the ODA to prohibit use of a proposed disposal site, the case will be forwarded through the respective Division office and CECW-D to the Secretary of the Army or his designee for further coordination with the Administrator of EPA and final resolution. The report forwarding the case should be in the format described in § 337.8 of this chapter.

(iv) The Secretary of the Army or his designee will evaluate the proposed project and make a final determination on the proposed disposal. If the decision of the Secretary of the Army or his designee is that ocean disposal at the proposed site is required because of the unavailability of economically fea-

sible alternatives, he will seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with section 103(d) of the ODA.

## PART 337—PRACTICE AND PROCEDURE

Sec.

337.0 Purpose.

337.1 Public notice.

337.2 State requirements.

337.3 Transfer of the section 404 program to the States.

337.4 Memoranda of Agreement (MOA).

337.5 General authorizations.

337.6 Statement of Findings (SOF).

337.7 Emergency actions.

337.8 Reports to higher echelons.

337.9 Identification and use of disposal areas.

337.10 Supervision of Federal projects.

AUTHORITY: 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 53 FR 14916, Apr. 26, 1988, unless otherwise noted.

### § 337.0 Purpose.

The practices and procedures part of this regulation apply to all Corps operations and maintenance activities involving the discharge of dredged or fill material in waters of the U.S. and ocean waters and related activities of local interests accomplished to ensure continued functions of constructed Corps projects.

### § 337.1 Public notice.

Presently, public notification of proposed discharges of dredged or fill material is required by the provisions of section 103 of the ODA and sections 401 and 404 of the CWA. District engineers are encouraged to develop procedures to avoid unnecessary duplication of state agency procedures. Joint public notification procedures should be a primary factor in the development of Memoranda of Agreement with the states as described in § 337.4.

(a) With the possible exception of emergency actions as discussed in § 337.7, the district engineer should issue a public notice for projects involving the discharge of dredged or fill material into waters of the U.S. or ocean waters unless the project is authorized by a general permit. Public